Supreme Court, U.S.
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No. 94-1541

In The

Supreme Court of the United States

October Term, 1994

JOHN BEY, JAMES JOHNSON, AND E. E. VANBUSKIRK,
in their individual capacities,

Petitioners,

v.

KENNETH L. BISBEE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

KENNETH L. BISBEE, Plaintiff, vs. THE BOARD OF COUNTY COMMISSIONERS OF CONVERSE COUNTY, WYOMING; JOHN BEY, Sheriff of Converse County, in his individual and official capacities; and JAMES JOHNSON and E. E. VANBUSKIRK, in their individual and official capacities, Defendants.	)	NO. 92-CV-252-B

ORDER REGARDING SUMMARY JUDGMENT MOTIONS

This matter comes before the Court on July 8, 1993, on defendants' motions for summary judgment. The Court, having considered the materials on file both in support of and in opposition to the motions, having considered the arguments of counsel, and being fully advised in the premises, FINDS and ORDERS as follows:

BACKGROUND

Plaintiff Kenneth Bisbee ("Bisbee") brings this suit against the Board of County Commissioners of Converse County ("Board"), Converse County Sheriff John Bey ("Bey"), Undersheriff James Johnson ("Johnson"), and Sergeant E.E. VanBuskirk ("VanBuskirk"), for wrongfully

terminating his employment as a deputy sheriff in violation of his constitutional rights to due process and free expression. Bisbee was first employed by the Sheriff's Department of Converse County, Wyoming on August 17, 1987. In January of 1989, he was promoted to deputy sheriff.

Bisbee alleges that in January of 1991, he had an employment related dispute with VanBuskirk, his immediate supervisor. Bisbee initiated a grievance procedure pursuant to the policy manual. In response, VanBuskirk issued Bisbee a written letter of reprimand. In July of 1991, Bisbee alleges that he discovered evidence suggesting that VanBuskirk had falsified records in order to wrongfully take possession of a rifle that had been found by a citizen and turned over to the Sheriff's Department. Bisbee filed an incident report alleging official misconduct by VanBuskirk. On July 15, 1991, VanBuskirk and Johnson recommended to Sheriff Bey that Bisbee's employment be terminated. Bey terminated Bisbee's employment effective July 17, 1991, without an investigation, and without a hearing before the Board of County Commissioners.

Plaintiff Bisbee makes the following claims in his amended complaint.

1. First Amendment – Bisbee alleges that he was fired in retaliation for filing an incident report claiming official misconduct by VanBuskirk, and because he initiated a grievance proceeding against VanBuskirk. Plaintiff asserts that it was his duty to file the incident report, and that the retaliatory firing violated his right of free expression. U.S. Const. amend. I, Wyo. Const. art. 1 §§ 20, 21, 22.

2. Due Process – Plaintiff asserts that he had a property interest in continued employment, and that he was deprived of that property interest without due process in violation of the Fourteenth Amendment to the United States Constitution and Article 1, Section 6 of the Wyoming Constitution.

In addition, the Converse County Personnel Policy Manual states:

> If the department head feels that termination of the employee is warranted, a complete investigation of the situation shall be conducted by the department head and the employee shall be granted a hearing before the Board of County Commissioners.

Plaintiff alleges that the Sheriff's Department and Board of County Commissioners violated its own policy by not conducting an investigation and granting plaintiff a hearing before the Board.

3. Conspiracy – Plaintiff alleges that defendants conspired to violate his constitutional rights, and that he is entitled to compensation pursuant to 42 U.S.C. §§ 1985 and 1988.

4. Wrongful discharge – A deputy sheriff has a duty to protect life and property, preserve the peace, maintain order and uphold the law. WYO. STAT. §§ 18-3-602, 606, 609 (1977 & Supp. 1992). Bisbee asserts that he was upholding the law when he filed an incident report claiming official misconduct by VanBuskirk. Bisbee alleges that the filing of the incident report was the reason he was fired. Thus, he was fired for doing his duty.

On May 6, 1993, this Court entered an order granting the Board of County Commissioner's motion for summary judgment. However, the Court denied defendant Bey and Johnson's motion to strike the "official capacity" language in the complaint. The Court reasoned that county employees could be sued in their official capacity, and that the County may be liable for the defendants' official actions.

Subsequently, the Board of County Commissioners intervened in the suit in order to represent its interests and potential liability arising from official acts by the defendants. The Board moves for dismissal of plaintiff Bisbee's claims against the defendants in their "official capacities." Defendants Bey, Johnson, and Vanbuskirk have also filed motions for summary judgment.

STANDARD OF REVIEW

"By its very terms, [the Rule 56(c)] standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

The trial court decides which facts are material as a matter of law. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248; *see also Carey v. United States Postal Service*, 812 F.2d 621, 623 (10th Cir. 1987). In considering a party's motion

for summary judgment, the court must examine all evidence in the light most favorable to the nonmoving party. *Barber v. General Elec. Co.*, 648 F.2d 1272, 1276 n.1 (10th Cir. 1981).

Summary judgment may be entered "against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Carey*, 812 F.2d at 623. The relevant inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Carey*, 812 F.2d at 623.

DISCUSSION

A. Board of County Commissioner's Motion for Summary Judgment

The Board of County Commissioners argues that neither the original complaint nor the amended complaint allege sufficient facts to state a cause of action against the County for the official acts of the individual defendants. The Board asserts that plaintiff Bisbee fails to allege that Sheriff Bey or other individual defendants acted pursuant to official policy. Rather, plaintiff's complaint alleges that the individual defendants failed to act pursuant to official policy by not complying with existing written policies of the County and the Sheriff's office. The Court has reviewed the amended complaint, and agrees that the complaint fails to allege that the professed retaliatory termination, the inadequate investigation and denial of a

hearing, or the alleged conspiracy were undertaken pursuant to official policy. However, even if the complaint is read broadly, the plaintiff's claim against the County and the defendants in their official capacity still fails.

The Court, in its May 6, 1993 order recognized that acts by other officials may represent official policy giving rise to municipal liability under § 1983. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) *quoting Monell*, 436 U.S. at 694. In addition, "[m]unicipal liability may be imposed for a single decision by municipal policymakers **under appropriate circumstances**. . . . " *Pembaur*, 475 U.S. at 480. (emphasis added). However, after additional study, the Court holds that this case does not represent the "appropriate circumstances" alluded to in *Pembaur*.

"Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy . . . caused a constitutional tort. [A] municipality cannot be held liable *solely* because it employs a tortfeasor – or in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell*, 436 U.S. at 691. "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 U.S. (1985). (emphasis added). A single act of unconstitutional conduct will not support a finding of official policy. *Pembaur*, 475 U.S. at 478 n. 6; *Lusby v. T.G. & Y. Stores, Inc.*, 796 F.2d 1307, 1312 (10th Cir. 1986) *cert. denied* 479 U.S. 884.

Therefore, in order for Converse County to be found liable, at a minimum, it must be established that there was an existing unconstitutional County policy. Once it has been established that an unconstitutional policy existed, a single application of that policy may trigger liability.

Plaintiff alleges that defendants failed to follow existing (and presumably constitutional) policies in terminating Bisbee, not that the existing policies were unconstitutional. After viewing the facts in this case in a light most favorable to the plaintiff, the Court finds that the plaintiff has failed to make a sufficient showing that the defendants' acts "may fairly be said to represent official policy." *Monell*, 436 U.S. at 694.

B. Defendants Bey, Johnson, and VanBuskirk's Motions for Summary Judgment

1. First Amendment Claim

Bisbee alleges that he was fired in retaliation for filing an incident report claiming official misconduct by VanBuskirk, and because he initiated a grievance proceeding against VanBuskirk. The defendants retort that they did not discover Bisbee's incident report detailing VanBuskirk's misconduct until two days **after** Bisbee's employment was terminated. Therefore, because they had no knowledge of the report, they had no reason to retaliate.

However, the evidence is not conclusive. Sergeant Greg Way states in an affidavit that Bisbee showed him the incident report regarding VanBuskirk's misconduct

on July 6, 1991. Bisbee then sealed the report in an envelope and placed it in Undersheriff Johnson's letter basket. Sergeant Way states that he called Sheriff Bey that evening, and told him that Bisbee had filed a report regarding VanBuskirk's mishandling of found property. Based on Sergeant Way's affidavit, there is a factual dispute as to when defendants Bey, Johnson, and VanBuskirk learned of Bisbee's report, and if that knowledge influenced their decision to terminate Bisbee's employment.

Next the defendants contend that plaintiff's First Amendment claim should be dismissed because plaintiff Bisbee's incident report is not protected speech. The Court disagrees. Bisbee's incident report relates to alleged official misconduct by Sergeant VanBuskirk, and can be fairly characterized as speech on a matter of public concern, which triggers First Amendment protection. *Connick v. Myers*, 461 U.S. 138, 146 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 572 (1968) (Teacher's expression of opinion on merits of bond issue was speech of public concern); *Leuthje v. Peavine School District of Adair County*, 872 F.2d 352, 355 (10th Cir. 1989) (The Supreme Court has a broad definition of what constitutes speech of public concern); *Conaway v. Smith*, 853 F.2d 789, 797 (10th Cir. 1988) ("When balancing the rights of the employee against those of the employer, an employee's First Amendment interest is entitled to greater weight where he is acting as a whistle blower in exposing government corruption.")[1]

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[1] At trial, the burden is on the plaintiff to establish, by a preponderance of the evidence, that the protected activity was a 'substantial' or 'motivating' factor in the termination." *Brown v.*

2. Due Process

Defendants argue that there can be no due process violation because plaintiff Bisbee had no property interest to continued employment. The Court agrees.

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

WYO. STAT. § 18-3-602(b) provides:

> With the consent of the board of county commissioners each county sheriff may **appoint** one (1) or more full-time deputies. . . . The sheriff may also **appoint** other assistants as necessary to properly administer the affairs of the office. (emphasis added).

Reardon, 770 F.2d 896, 905 (10th Cir. 1985); *see also Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *but see Rivera v. U.S.*, 924 F.2d 948, 954 n.7 (Where 5 U.S.C. § 1221(e)(2) applies, it requires an agency asserting an affirmative defense that it would have taken the same personnel action against the employee even in the absence of the employee's disclosure, to make that showing by clear and convincing evidence.

The Tenth Circuit interpreted this statute in *Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir. 1988). In *Dickeson*, a head jailer and a special deputy who were appointed by the former Sheriff sued after their employment was terminated by a newly elected Sheriff. The Tenth Circuit stated that "Wyoming law gives Sheriffs broad authority in the appointment of deputies . . . and the like to administer their offices."[2] *Dickeson*, 844 F.2d at 1438. "[U]nless modified by a statute or otherwise, the power of appointment to an office such as that of [Sheriff], carries with it as an incident the power of removal." *Id.* at 1439 *quoting Carlson v. Bratton*, 681 P.2d 1333, 1336-37 (Wyo. 1984).

The Court finds that the Board of County Commissioners for Converse County is not empowered to control Sheriff Bey's appointments under his independent office created by the Wyoming statutes. Therefore, no property interest is created by the personnel policies and practices of the Board of County Commissioners. *Dickeson*, 844 F.2d at 1439.

Bisbee attempts to distinguish *Dickeson* by arguing that Sheriff Bey specifically issued and adopted the County's personnel manual for the benefit of the members of the Sheriff's Department, and that the County's personnel manual gave certain rights to Bisbee. The Court is not persuaded.

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[2] "A deputy sheriff is an officer, not an employee; he is appointed, not hired." *Pfister v. Niobrara County*, 557 P.2d 735, 738 (Wyo. 1976).

On similar facts, Judge Carrigan, in the district of Colorado, held that a deputy sheriff served at the pleasure of the Sheriff, and that the "Sheriff's intentions in agreeing to utilize the personnel manual [adopted by the Logan County Board of Commissioners] with respect to his employees are irrelevant since his statutory authority to discharge his employees at will could not be abrogated." *Jackson v. Johns*, 714 F. Supp. 1126, 1130 (D. Colo. 1989). This result is in keeping with "the important public policy of allowing a duly elected [Sheriff] . . . to appoint individuals of his or her own choosing to certain key positions. *Farnsworth v. Town of Pinedale, Wyo.*, 968 F.2d 1054 (10th Cir. 1992). Therefore, the Converse County Personnel Policy Manual, although utilized by Sheriff Bey's office, does not trump the Sheriff's power of appointment, and does not create a property interest in Bisbee, an appointee.[3]

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[3] The fact that plaintiff Bisbee did not have a property interest in his employment does not defeat his First Amendment claim alleging a retaliatory firing. *Owens v. Rush*, 654 F.2d 1370, 1379 (10th Cir. 1981).

Even if the provisions of the policy manual were determinative, under those provisions, Bisbee appears to be nothing more than an at will employee. Policy 103:1 creates an employment-at will relationship between an employee and the County. The Comment to that section states that: "Employees who do not have a written employment agreement are employed at the will of the County and are subject to termination at any time, for any reason, with or without cause, and with or without notice. . . . "

Also, on January 14, 1988, plaintiff Bisbee signed the following statement:

> I, Kenneth L. Bisbee, have read section 103 of the Converse County personnel policy manual. I understand that I am hired at the will of John F. Bey, the

3. Conspiracy

Plaintiff Bisbee asserts that defendants Bey, Johnson and VanBuskirk met and agreed to terminate Bisbee as deputy sheriff on a charge of insubordination, contrived and manufactured by VanBuskirk, and in direct retaliation for Bisbee's exercising his right and duty to report serious misconduct by VanBuskirk. Defendants argue that the conspiracy claims a bald allegation that is ripe for summary judgment because Bisbee has failed to submit any evidence supporting this conspiracy claim. *Buschi v. Kirven*, 775 F.2d 1240, 1248 (4th Cir. 1985).

However, plaintiff has convinced the Court that there is a question of fact as to when defendants Bey, Johnson, and VanBuskirk knew about Bisbee's incident report. Further, the three defendants met to discuss Bisbee's confrontation with VanBuskirk, and it was decided that Bisbee should be discharged. Plaintiff also alleges that defendants Johnson and VanBuskirk agreed to prepare a statement for Neumeyer's signature, in an effort to eliminate the discrepancies between Neumeyer's and VanBuskirk's reported handling of the found rifle.

After viewing the facts in a light most favorable to the plaintiff, the Court has decided to let the conspiracy

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head of the Sheriff's department, and that I am subject to termination at any time, with or without notice, with or without cause, and that nothing contained in the Converse County Personnel policy manual, employment application, or other materials given to me in connection with my employment with the County creates an expressed or implied contract of employment for a definite period of time.

claim go forward. *See Wright v. No Skiter Inc.*, 774 F.2d 422, 426 (10th Cir. 1985) ("The claim of retaliation under [the conspiracy provisions of] § 1985(2) raised a factual issue which could not be determined on a motion for summary judgment.")

4. Wrongful Discharge Based on Public Policy

Plaintiff Bisbee argues that defendants terminated his employment in violation of Wyoming's public policy, which requires a deputy sheriff to protect life and property, preserve the peace, maintain order and uphold the law. WYO. STAT. §§ 18-3-602, 606, 609. The Wyoming Supreme Court has recognized a very narrow exception to the at will doctrine. *Horne v. J.W. Gibson Well Service Co.*, 894 F.2d 1194, 1196 (10th Cir. 1990). In *Griess v. Consolidated Freightways Corporation*, 776 P.2d 752, 754 (Wyo. 1989), the Wyoming Supreme Court stated:

> We have been cautious about approving tort actions which might interfere with the traditional rule of "at will" employment. [citations omitted]. However, in the unique situation presented here, where a strong public policy is embodied in the worker's compensation statutes and the constitution and **no other remedy is available,** an exception to the doctrine of "at will" employment is justified. (emphasis added).

The Court finds that the "Unique situation" which warranted the finding of a public policy tort in *Griess*, is not present here. *See Nelson v. Crimson Enterprises, Inc.*, 777 P.2d 73 (Wyo. 1989). One reason which supports this finding is that other remedies are available to Bisbee.

5. Qualified Immunity

Finally, the defendants argue that they are shielded from liability by qualified immunity. "Government officials performing discretionary functions are entitled to qualified immunity from suit insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Laidley v. McClain*, 914 F.2d 1386, 1394 (10th Cir. 1990) (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "The key to the inquiry is the objective reasonableness of the official's conduct in light of the legal rules that were clearly established at the time the action was taken." *Laidley*, 914 F.2d at 1394 (*citing Melton v. City of Oklahoma City*, 879 F.2d 706, 727 (10th cir. 1989) *reh'g granted in part*, 888 F.2d 724).

The Court holds that plaintiff's First Amendment right is a clearly established constitutional right, and that a reasonable person would have known that firing a person for exercising those rights is unlawful. *Laidley*, 914 F.2d at 1395. However, a genuine issue of material fact remains as to whether there was a retaliatory firing which violated Bisbee's First Amendment rights.

THEREFORE it is

ORDERED that the Converse County Board of Commissioner's motion for summary judgment be, and the same is hereby **GRANTED.** Defendants Bey, Johnson, and VanBuskirk are dismissed from this suit in their official capacities. They remain as defendants in their individual capacities.

ORDERED that defendants Bey, Johnson, and Van-Buskirk's motions for summary judgment be **GRANTED IN PART** as follows:

1. Plaintiff's § 1983 claim for a deprivation of a property interest without due process is hereby **DISMISSED.** The Court holds that plaintiff Bisbee did not have a property interest in continued employment.

2. Plaintiff's claim for wrongful discharge in violation of public policy is hereby **DISMISSED.**

3. the First Amendment claim and the conspiracy claim survive defendants' motions for summary judgment.

Dated this 5th day of August, 1993.

/s/ Clarence A. Brimmer
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

KENNETH L. BISBEE, Plaintiff, vs. THE BOARD OF COUNTY COMMISSIONERS OF CONVERSE COUNTY, WYOMING; JOHN BEY, Sheriff of Converse County, in his individual and official capacities; and JAMES JOHNSON and E. E. VANBUSKIRK, in their individual and official capacities, Defendants.	)	NO. 92-CV-252-B

ORDER DENYING DEFENDANTS' JOINT MOTION FOR RECONSIDERATION

This matter comes before the Court on defendants Bey, Johnson and VanBuskirk's joint motion for reconsideration. The Court, having considered the materials on file both in support of and in opposition to the motions, and being fully advised in the premises, FINDS and ORDERS as follows:

The Court finds that factual issues remain regarding plaintiff Bisbee's First Amendment and Conspiracy claims.

THEREFORE, it is

ORDERED that defendants Bey, Johnson and Van-Buskirk's joint motion for reconsideration be, and the same is hereby denied.

Dated this 12th day of August, 1993.

/s/ Clarence A. Brimmer
UNITED STATES
DISTRICT JUDGE